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AMMETLIFE INSURANCE BHD v. NANDAKUMAR APPU & ANOR

HIGH COURT MALAYA, IPOH
NOORIN BADARUDDIN JC
[CIVIL APPEAL NO: 12BNCVC-108-12-2014]
B 30 SEPTEMBER 2015

AGENCY: *Authority of agent – Ostensible authority – Misrepresentation by agents of insurance company – Whether insurance agents had ostensible authority to act on behalf of insurance company – Whether insurance company could be held liable* C *for acts of agents*

CONTRACT: *Misrepresentation – False representation – Insurance agents – Misrepresentation of insurance policy as investment scheme – Whether insurance agents had ostensible authority to act on behalf of insurance company – Whether* D *insurance company could be held liable for acts of agents – Whether payment of premium could be recovered from insurance company*

INSURANCE: *Agents – Insurance policy – Misrepresentation of insurance policy as investment scheme – Whether insurance agents had ostensible authority to act on behalf of insurance company – Whether insurance company could be held liable* E *for acts of agents – Whether payment of premium could be recovered from insurance company – Insurance Act 1996, ss. 150 & 151*

The appellant was an insurance company, whilst the second and third defendants (in the Sessions Court) were authorised agents of the appellant. In 2009, the second defendant made representations to the first respondent to F invest in an investment scheme of the appellant. In reliance of the representations made by the second defendant, the first respondent agreed to take up the investment scheme. The first respondent invested a sum of RM50,000 for himself and another RM50,000 for his wife *ie*, the second respondent. A year later, the second defendant requested the first respondent G to pay an additional amount to keep the policies alive. Doubting the additional amount requested, the first respondent went to the appellant's office to seek explanations. At the appellant's office, the third defendant who was also the then Unit Manager of the appellant confirmed the requirement of the additional amount. Sometime in 2013, the first respondent discovered that the policy was a whole life policy and not an investment scheme. As a H result, the first respondent went to the appellant's office again and met the manager in the appellant's company. The first respondent was informed that the second and third defendants had been dismissed. Subsequently, the respondents filed a claim against, amongst others, the appellant for a declaration that the life insurance policies issued by the appellant be declared I null and void for misrepresentation and mistake. The respondents also claimed for the return of the premiums paid. The Sessions Court Judge ('SJ') found that the second and third defendants were agents of the appellant

pursuant to s. 151 of the Insurance Act 1996 and that any statement made by both were deemed to be made by the appellant. Accordingly, the SJ found the appellants liable for the misrepresentation of both the second and third defendants. Hence, the present appeal.

Held (dismissing appeal with costs):

(1) The SJ was correct in concluding that there was no 'meeting of the mind' when the contract was entered. It was clear from the evidence of the first respondent, that the second and third defendants made representation that it was an investment scheme when in actual fact it was a whole life policy. Through the evidence adduced before the trial court, the SJ was right in finding that the respondents took up the policy because they believed that it was an investment scheme as per the representation made by the second and third defendants. The action taken by the respondents in verifying the scheme in the subsequent years until the civil suit was filed, proved that they would not have taken the policy if they knew that the policy benefits were not as what was represented to them. (paras 29 & 34)

(2) The respondents took the 'investment scheme' in 2009 and therefore the law governing the insurance matters in 2009 was the Insurance Act 1996. In the circumstances, the provisions of ss. 150 and 151 of the Insurance Act 1996 still remained in force. Sections 150 and 151 are all encompassing. Based on ss. 151 and 150(4) of the Insurance Act 1996, the SJ did not err in coming to the conclusion that statements made by the second and third defendants were deemed to have been made by the appellant and that upon the misrepresentation, the respondents are entitled to rescind the contract. (paras 39 & 40)

(3) Section 151 does not seem to limit the authority of the agents. As long as the agent is authorised to solicit or negotiate a contract of insurance on behalf of the insurance company, it is sufficient to bind the insurance company. The second and third defendants were still authorised agents of the appellant at the time of the contract and misrepresented the policy as an investment scheme to the respondents in their course of business. In the circumstances, it cannot be denied that the second and third defendants were acting as agents on behalf of the appellant. The conduct of both the second and third defendants was imputed on the appellant. Therefore, the respondents were entitled to rely on the ostensible authority of the second and third defendants acting as agents of the appellant. (paras 45 & 50)

(4) The contract of insurance between the respondents and appellant was not made '*uberrimae fides*' *ab initio* due to the misrepresentation made by the second and third defendants. There was a positive duty on the part of the appellant and the appellant cannot rely on estoppel to escape

liability. There is a duty imposed by law to be truthful and the appellant could not discharge that duty simply on account of the fact that the respondent had failed to inquire about some material facts. Further, the second and third defendants did not abide by the duty of full disclosure and did not demonstrate utmost good faith in inducing the respondents to enter into the AMFlexi whole life policy. (paras 55 & 58)

(5) The lapse of time which can be taken to constitute affirmation or election to recognise a contract depended on the facts of the case and the nature of the contract. The four years lapse was not unreasonable as the first respondent took positive steps during those years to clarify the policy he took. The respondents had taken all reasonable steps before and after discovering the truth of the matter. In the upshot, misrepresentation by the second and third defendants as agents of the appellant was undoubtedly proven and thus the appellant was liable for the acts of its agents pursuant to the Insurance Act 1996. (paras 62 & 64)

Case(s) referred to:

China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal [1996] 3 CLJ 163 FC ***(refd)***

GS Gill Sdn Bhd v. Descente Ltd & Another Case [2008] 1 LNS 905 CA ***(refd)***

Johara Bi Abdul Kadir Marican v. Lawrence Lam Kwok Fou & Anor [1980] 1 LNS 199 FC ***(refd)***

Leong Kum Whay v. QBE Insurance (M) Sdn Bhd & Ors [2006] 1 CLJ 1 CA ***(refd)***

Poh Siew Cheng v. American International Assurance Co Ltd [2005] 1 LNS 252 HC ***(refd)***

Ravichanthiran Ganesan v. Percetakan Wawasan Maju Sdn Bhd & Ors [2008] 9 CLJ 546 HC ***(refd)***

Rosazanam Khalid v. Tri-Prestige Sdn Bhd & Another Appeal [2013] 1 LNS 1514 CA ***(refd)***

Tan Jing Jeong v. Allianz Life Insurance Malaysia Bhd & Anor [2011] 4 CLJ 710 HC ***(refd)***

The "Melanie" United Oriental Assurance Sdn Bhd Kuantan v. WM Mazzarol [1984] 1 LNS 41 FC ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 191

Financial Services Act 2013, ss. 129, 275, Sch. 9 paras. 11, 12

Insurance Act 1963 (since repealed), s. 44A

Insurance Act 1996 (since repealed), ss. 148, 150(4), 151(3), 199

For the appellant - K Vibalananthan (Santhana Dass with him); M/s Dass, Jainab & Assoc

For the respondents - M Mathialagan (Lizawati Salaman with him); M/s Madhi, Param & Co

Reported by Sandra Gabriel

JUDGMENT

Noorin Badaruddin JC:

[1] The respondents filed a claim against the appellant and two others (hereinafter referred to as the second defendant and the third defendant) for a declaration that the Life Insurance Policies No 000350155 and 000350156 issued by the appellant be declared null and void for misrepresentation and mistake. The respondents also claimed for the return of the premiums paid amounting to RM110,000, damages and costs in the Sessions Court *vide* Civil Suit B5-NCVC-06-01-2014.

[2] After a full trial, the learned Sessions Judge ('SJ') allowed the respondents' application. This is the appellant's appeal against the said decision.

Facts

[3] The respondents are husband and wife. The appellant is an insurance company, whilst the second defendant was an authorised agent of the appellant and the third defendant was an authorised agent as well as a Unit Manager of the appellant's company.

[4] In 2009, the second defendant approached the first respondent and made representations to the first respondent to invest in an investment scheme of the appellant. The first respondent was asked to pay a one-time payment and was told that he will get a 6% yearly interest on the sum invested. The second defendant also represented to the first respondent that a 33% dividend will be obtained in the first year of investment with interest in the range of 6-15% yearly. The first respondent was also told that the investment scheme further offered an insurance coverage of RM500,000 and that within seven years the first respondent will get double the amount invested.

[5] The first respondent agreed to take up the investment scheme and signed empty proposal forms (P3 and P4) which were later filled up by the second and third defendants. The first respondent invested a sum of RM50,000 for himself and another RM50,000 for his wife, the second respondent, as premium. Both policies came into force on 30 June 2009.

[6] According to the first respondent, a year later, after signing the proposal forms P3 and P4 which were dated 23 June 2009, the second defendant came to see him and asked him to top-up the amount of RM5,000 for each person to keep the policies alive. The first respondent then began to have some doubts as to the above requirement made by the second defendant and decided to go to the appellant's office to seek explanation. There, he met the third defendant who was then the Unit Manager of the appellant and was told the same as what the second defendant had told him before.

[7] The first respondent then told the third defendant that he could not afford to pay the top-up amount of RM5,000 each as he was not told earlier that there would be a top-up payment that had to be made. The third defendant then said that the amount could be reduced to RM2,500 for each policy. Thinking that it was still for the investment purposes and as he was assured as such, the first respondent then paid the agreed amount of RM5,000 for both policies.

[8] According to the first respondent, he believed all the explanation given by the second defendant which was later confirmed by the third defendant. In evidence (witness statement at p. 34 of the rekod rayuan tambahan Kedua) the first respondent stated that even though he read the policies given to him, he was not able to understand the whole content. Therefore, he believed the representation made by the second and third defendants. The first respondent further stated in evidence that when he received copies of the policies, he saw the word "whole life". He later called the second defendant and inquired as to why it was stated as such. The second defendant then told him that it was a flexi plan which provided coverage upon death of the policy holder.

[9] Some time in 2013, the first respondent was approached by a friend who introduced him to the same policy. The first respondent told the friend that he had invested in the same scheme and showed P7 and P8. The first respondent was then told that the policy was a whole life policy and not an investment scheme.

[10] On 4 September 2013, together with his friend SP4, the first respondent went to the appellant's office again and this time he met SP5 who was the manager in the appellant's company and was told that both the second and third defendants had committed 'misselling' and had cheated many of their clients. SP5 told the first respondent that both the second and the third defendants were dismissed from their various posts and the unit headed by the third defendant was also dissolved. SP5 then advised the first respondent to lodge a complaint to the appellant's headquarters which the first respondent did on the same day (P11). The first respondent further lodged a police report (P13). P14 ('Surat Akuan') was also prepared by the first respondent on 3 October 2013. On 26 November 2013, the respondents through their solicitor Messrs Madhi Param & Co issue a demand letter (P15A) to the appellant for the return of their investments. Upon the refusal of the appellant to accede to the demand, the respondents proceeded with the civil suit mentioned earlier in the Sessions Court.

The Appellant's Submission

[11] The appellant submitted that the respondents failed to prove the misrepresentation in the sense that none of the ingredients of actionable misrepresentation was proved save for the evidence of the first respondent

alone and that the learned SJ erred in law in concluding that there was misrepresentation in the absence of the second and the third defendants during the trial.

[12] The appellant further submitted that the respondents knew all along that it was a life policy insurance with investment features. The appellant stated that the respondents had made an application to reduce the annual premiums and received yearly statements from the appellant. Yet, the respondents waited for four years to attempt to terminate the policy on the grounds of alleged misrepresentation. That, according to the appellant spoke much for the good faith and the credibility of the respondents.

[13] It was the appellant's contention that they were not liable under s. 191 of the Contracts Act for the unauthorised acts of the agents and any representations made contrary to the sales illustration was unauthorised and that vicarious liability on the part of the appellant was subjected to s. 191 of the Contracts Act 1950.

[14] The respondents were said to have failed to exercise their right to terminate the policy within 15 days from the receipt of the policy as statutorily provided under s. 148 of the Insurance Act 1996 and that therefore, the respondents were precluded from challenging the policy or the pre-contractual representations made.

[15] That if there was misrepresentation, the policy remained voidable and valid until rescinded and that before the commencement of the legal proceedings the respondents had not rescinded the policy and hence the policy was valid and still in force.

[16] The appellant further stated in their memorandum of appeal that the learned SJ erred in law and in fact for failing to take into consideration s. 150(4) of the Insurance Act 1996 in deciding that the appellant was liable to the loss suffered by the respondents.

The Learned SJ's Findings

[17] The learned SJ heard the evidence of the respondents and three of their witnesses whilst the appellant called three witnesses to testify. Judgment in default was entered against the second and third defendants. They did not turn up during the trial. Nevertheless, the second defendant did put up his statement of defence (pp. 2-5 of rekod rayuan tambahan kedua).

[18] Briefly, the learned SJ found that the second and third defendants were agents of the appellant pursuant to s. 151 of the Insurance Act 1996 and that any statement made by both were deemed to be made by the appellant. It was also found that both the second and third defendants made representations to the respondents and that the representations were misleading, false, deceptive and 'concealment of fact'. The learned SJ stated further that the policies issued to the respondents in the form of P7 and P8 were voidable and that the respondents had the right to rescind the same. The learned SJ further held

A that the contract of insurance was made without "utmost good faith" and that the appellant was liable for the misrepresentation of both the second and third defendants.

The Court's Findings

B **[19]** This court is reminded that as an appellate court, it will not interfere with the factual findings of the court below unless it appears that those findings are clearly wrong. As stated in the Federal Court case of *China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal* [1996] 3 CLJ 163, it is even more undesirable to do so where the conclusions reached, to a large extend depended on the credibility of the witnesses and the impression formed by the court which has seen them and judged their honesty and accuracy.

[20] Firstly, on the issue of whether there was misrepresentation, as submitted by learned counsel for the appellant, it is true that the burden to prove the misrepresentation was on the respondents. The respondents had to prove that the said misrepresentation influenced them into making the decision to purchase the said policy as investment. Learned counsel for the appellant submitted to this court the case of *Ravichanthiran Ganesan v. Percetakan Wawasan Maju Sdn Bhd & Ors* [2008] 9 CLJ 546; [2008] 8 MLJ 450 where the High Court highlighted that in order to prove misrepresentation the respondents as plaintiffs in the civil suit must show that the second defendant had represented a statement of fact.

[21] From the pleadings filed by the respondents in the civil suit mentioned above, misrepresentation was pleaded. In fact, from the pleadings and evidence tendered in the Sessions Court, the allegations relating to the misrepresentation was particularised by the first respondent. In this case, the cause of action was misrepresentation and this court found that the misrepresentation was proven on balance of probabilities. In *Rosazanam Khalid v. Tri-Prestige Sdn Bhd & Another Appeal* [2013] 1 LNS 1514; [2014] 1 MLRA 584, the Court of Appeal held:

> ... The respondent had merely pleaded misrepresentation *simpliciter* against the appellants, and not of fraudulent misrepresentation as alleged by them. Accordingly, the allegation of misrepresentation made against the 1st and 2nd appellants to be proved on a balance of probabilities only. This was correctly applied by the trial judge …

[22] The respondents in their statement of claim (pp. 10-20 of the appeal record) pleaded that:

(i) both the second and third defendants were authorised agents of the appellant;

(ii) the second defendant made representations;

(iii) the third defendant confirmed the representations;

(iv) the respondents suffered losses due to the misrepresentations;

(v) the respondents terminated the policies *vide* letter of 23 December 2013; and

(vi) based on s. 150(4) and 151 of the Insurance Act 1996, the appellant was liable.

[23] It was crystal clear from the pleadings and evidence adduced during the trial, at the time of contracting the said policy, the first respondent relied on the representation made by the second defendant that the policy was an investment policy. The learned SJ after hearing the evidence of the witnesses stated in her judgment as follows:

> Berdasarkan keterangan di atas mahkamah ini berpuas hati D2 dan D3 telah melakukan salahnyata yang berikut:
>
> (1) Pembayaran RM100,000 adalah untuk tujuan pelaburan yang akan diberi perlindungan insuran RM500,000
>
> (2) Pembayaran RM100,000 ini adalah sekali sahaja dan tiada bayaran lanjut perlu dibuat
>
> (3) Pelaburan ini akan memperolehi 33% dividen pada tahun pertama dan akan dibayar 6% faedah setiap tahun.

[24] Once the respondents' case was proven on balance of probabilities, then the burden of proof shifted to the appellant to refute the same. In *Johara Bi Abdul Kadir Marican v. Lawrence Lam Kwok Fou & Anor* [1980] 1 LNS 199; [1981] 1 MLJ 139, the Federal Court held:

> … on the question of onus of proof, that the appellant had on a balance of probabilities, discharged the onus on her, the burden then shifted to the respondents and as held by the learned trial judge, the respondents had not discharged the burden even on a balance of probabilities and there should have been judgment for the appellant …

[25] This court found that the learned SJ did not err in relying on the evidence given by the first respondent. The learned SJ believed the evidence given by the first respondent and his witnesses and having the audio visual advantage there was nothing cogent for this court to disturb the findings of the learned SJ on the basis of her seeing the demeanour, veracity and credibility of the witnesses. The learned SJ analysed the evidence of the respondents and their witnesses before the court and finally found that their evidence were consistent and credible.

[26] The learned SJ as the trial judge was entitled to believe evidence of any witnesses as probable. In *GS Gill Sdn Bhd v. Descente Ltd and Another Case* [2008] 1 LNS 905; [2008] 6 MLJ 181, the Court of Appeal held:

> … The High Court judge had two versions before him. He found the plaintiff's version more probable and accepted it. He was perfectly entitled to do that. The Court of Appeal, having reviewed the evidence, was

A entirely in agreement with the High Court judge. When viewed objectively, the Plaintiff's explanation for what it did and the way in which it did it appeared more probable ...

[27] This court disagreed with the appellant's contention that the respondents ought to have called the second and third defendants to testify B and without having the benefit of cross-examining them, the court could not rely solely on the evidence given by the respondents that there was misrepresentation. This court was of the view that the respondents could not be expected to subpoena the second and third defendants to appear in court to corroborate the misrepresentation or otherwise as submitted by the C appellant's learned counsels, when they have been made parties to the suit and they failed to turn up during the trial.

[28] The second and the third defendants as parties to the suit have the onus to defend the action. Since the third defendant did not file any defence, judgment in default was entered against her. The appellant has also a duty D to call the second and third defendants to testify since they were its agents. In *Poh Siew Cheng v. American International Assurance Co Ltd* [2005] 1 LNS 252; [2006] 6 MLJ 57, the High Court held that:

> … Ng See Sun was and is an agent of the defendant and it was he who filled the proposal form. Being an agent of the defendant, the defendant E should be the one who should be calling Ng See Sun, after all, the latter was and is still the defendant's employee. Thirdly, why should the plaintiff risk calling Ng See Sun as his witness bearing in mind that Ng See Sun may turn turtle and, of crucial importance, this court would even construe Ng See Sun to be in collusion with the plaintiff and thereby the weight to be attached to Ng See Sun's evidence would be minimal …

F

[29] It was perfectly right for the learned SJ to conclude that there was no 'meeting of the mind' when the contract was entered. It was clear from the evidence of the first respondent in particular, that the second and third defendants made representation that it was an investment scheme when in actual fact it was a whole life policy. Since what was stated in the policy that G it was a whole life policy with an investment features and the respondents were told that it was a flexi plan, it was not difficult to comprehend on the part of the first respondent to believe that he bought an investment scheme as what was told to him by the agents of the appellant ie, the second and third defendants.

H

[30] In his statement of defence, the second defendant stated that he believed he was selling an investment scheme and not life insurance policy. The court could not be hindered to rely on the statement of defence filed by the second defendant as it formed part of the cause papers and evidence in the trial.

I

[31] The second defendant's statement of defence illustrated the truth of the evidence of the first respondent. The second defendant stated in his defence that he went to the respondents' house as an agent of the appellant and made

representation for an investment plan. He further stated that the first respondent met the third defendant and the third defendant made the same representations. Relying on the representations made, the respondents invested RM100,000 and that the second defendant obtained the respondents signatures on empty forms. The proposal forms were filled by the second and the third defendants. The second defendant stated that he himself did not know it was a whole life policy and thought it was an investment scheme. The second defendant stated further that the respondents top up payment of RM5,000 and all the while he believed that he sold an investment plan and not a whole life policy based on the representations of the third defendant.

[32] The conduct of the first respondent, the second and third defendants further corroborated the fact that the first respondent had entered the contract and held to the said scheme upon his believe that it was an investment scheme until he was told by his friend otherwise. The second defendant himself (in his statement of defence) stated he believed that he was selling an investment scheme. The first respondent signed empty proposal form which was filled up by the second and third defendants. This court found that it was misleading for the appellant to submit that it was the first respondent who reduced the annual premium from RM50,000 to RM2,500 and therefore the first respondent knew all along that it was a life insurance policy with investment features. But in actual fact, it was the second and third defendants who told the first respondent that it was a top-up to maintain the investment scheme and this happened after the first year of the investment when the respondents were supposed to have receive the 'profit' from the so-called investment.

[33] The learned SJ in her findings stated at pp. 264-266 of the 'rekod rayuan tambahan':

> Mahkamah ini mendapati dari keterangan SP1 (the 1st Respondent), adalah jelas semasa SP1 membeli polisi insuran P7 dan P8, fahaman beliau adalah bayaran adalah untuk pelaburan yang mempunyai perlindungan insuran RM50,000 dan juga akan membawa dividen 33% dalam tahun pertama serta faedah tambahan 6% setahun. Mahkamah ini mendapati keterangan SP1 dalam aspek ini disokong oleh SP2 (the 2nd Respondent) yang hadir dan dimaklumkan oleh SP1 pada masa material, sungguhpun SP2 tidak dengar pertuturan itu secara langsung. Keterangan SP1 disokong lanjut oleh SP4 bahawa SP1 ada memberitahunya bahawa beliau rasa tertipu dengan "pelaburan" ini. Mahkamah ini juga mendapati pada tahun berikutnya apabila dimaklumkan bahawa beliau perlu membayar premium tambahan RM5000 lagi untuk setiap seorang, response SP1 yang terkejut dan pergi bertanya kepada D3 sebab perlu menambah bayaran lagi, kesemua ini menunjukkan SP1 memang tidak sedar bayaran RM100,000 itu merupakan premium tahunan dan bukan bayaran sekali sahaja. Soalan SP1 pada D3 serta SP5 bahawa beliau difahamkan bayaran RM100,000 itu bayaran sekali sahaja menyokong lagi fikiran SP1 bahawa beliau mempercayai representasi D2 iaitu wang RM100,000 itu adalah pelaburan dan bukan untuk membeli polisi insuran. Perasaan terkejut dan

tertipu pada pihak SP1 disokong lanjut dengan perjumpaan SP1 dengan SP5, transkrip pertuturan mereka P12A, surat aduan P11, laporan polis P13 serta surat akuan bersumpah P14 semua adalah konsisten.

Sungguhpun kandungan P7, P8, penyata serta resit P9 dan P10 yang dihantar oleh D1 (the Appellant) jelas menunjukkan ianya berkaitan dengan polisi insuran 'whole life' dan bukan apa-apa 'pelaburan', mahkamah ini perlu mengambil ke dalam pertimbangan usaha plaintif pertama (the 1st Respondent) pergi ke pejabat D1 (the Appellant) untuk mendapatkan penjelasan dan kepastian dari D3 tentang 'skim pelaburan' yang diberitahu oleh D2. Selaku orang awam di masyarakat Malaysia ini, mahkamah ini mengambil notis kehakiman bahawa adalah munasabah untuk plaintif pertama menerima pengesahan secara lisan dari seorang Pengurus Unit yang duduk dalam pejabat D1. Mahkamah ini berpendapat adalah munasabah untuk plaintif pertama yang mendapat pengesahan dari D3, untuk menaruh kepercayaan penuh kepada kata-kata D2 dan D3, dan memilih untuk tidak menyiasat lanjut kandungan P7 dan P8. Mahkamah juga menerima adalah munasabah untuk SP1 mempercayai perkataan "whole life" dan "RM500,000" dalam P7 dan P8 merupakan perlindungan insuran diberi ke atas pelaburan mereka. Sungguhpun mahkamah ini menerima bahawa kedua-dua plaintif ini cuai dari segi tidak membaca dan memahami dengan teliti perkataan-perkataan dalam polisi P7 dan P8, tetapi mahkamah mendapati hakikat sebenarnya adalah tiada 'meeting of the mind' antara plaintif-plaintif dan D1 semasa memasuki kontrak P3 dan P4. Disebabkan kesilapan (mistake) fakta di atas, mahkamah ini berpendapat response SP1 selepas mendapat tahu mereka kena membayar premium tambahan RM5000 seorang setiap tahun berikutnya, adalah konsisten dengan surat aduan P11, rakaman P12 dan P12A, laporan polis P13 dan surat akuan bersumpah P14.

[34] Through the evidence adduced before the trial court, the learned SJ was right in finding that the respondents took up the policy because they believed that it was an investment scheme as per the representations made by the second and the third defendants. From the action taken by the respondents in verifying the scheme in the subsequent years until the civil suit was filed proved that they would not have taken the policy if they knew that the policy benefits were not as what was represented to them.

[35] Learned counsel for the respondents had brought to the attention of this court that the Insurance Act 1996 had been repealed and replaced by the Financial Services Act 2013 which came into operation from 30 June 2013. However, certain specific provisions in the Insurance Act 1996 remained in force until the coming into operation of s. 129 and the Sch. 9 of the Financial Services Act 2013. Section 275 of the Financial Services Act 2013 provides:

s. 275 - Savings and transitional provision in respect of specific provisions of repealed Insurance Act 1996

Notwithstanding the repeal of the Insurance Act 1996 under section 271:

(a) Subsections 147 (4) and (5), and sections 150 and 151 of the repealed Insurance Act 1996 shall continue to remain in full force

and effect until such date to be appointed by the Minister in accordance with subsection 1(2) for the coming into operation of section 129 and Schedule 9;

(b) Sections 144 and 224 of the repealed Insurance Act 1996 shall continue to remain in full force and effect until such sections are repealed by the Minister by notification in the *Gazette*; and

(c) ...

[36] Section 129 and Sch. 9 of the Financial Services Act 2013 came into operation on 1 January 2015. Therefore, the provisions of ss. 150 and 151 of the Insurance Act 1996 remained in force until 30 December 2014. Sections 150 and 151 of the Insurance Act 1996 were replicated in the Sch. 9 of the Financial Services Act 2013 as paras. 11 and 12 of the said Schedule.

[37] Paragraph 11 of Sch. 9 states:

Insurer's etc., pre-contractual duty of disclosure

…(1) No licensed insurer, insurance agent, approved insurance broker, approved financial adviser or financial adviser's representative in order to induce a person to enter into, vary or renew, or offer to enter into, vary or renew, a contract of insurance, whether or not a consumer insurance contract, with it or through him:

(a) Shall make a statement which is misleading, false or deceptive whether fraudulently or otherwise;

(b) Shall fraudulently conceal a material fact; or

(c) In the case of an insurance agent, use any sales brochure or sales illustration not authorised by the licensed insurer

(2) Where a person is induced to enter into, vary or renew a contract of insurance in a manner described in subparagraph (1), the contract of insurance shall be voidable and the person shall be entitled to rescind it …

[38] Paragraph 12 of Sch. 9 stipulates:

Section 12 - Knowledge of, and statement by insurance agent.

(1) A person who is authorised by a licensed insurer to be its insurance agent and who solicits or negotiates a contract of insurance in that capacity shall be deemed, for the purpose of the formation or variation of the contract of insurance, to be the agent of the insurer and the knowledge of that insurance agent shall be deemed to be the knowledge of the insurer.

(2) A statement made, or an act done, by the insurance agent shall be deemed, for the purpose of the formation or variation of the contract of insurance, to be a statement made, or act done, by the licensed insurer notwithstanding the insurance agent's contravention or subparagraph 11(1) or any other provision of this Act.

A (3) Subparagraph (1) shall not apply:

(a) Where there is collusion or connivance between the insurance agent and the proposer in the formation or variation of the contract of insurance; or

B (b) Where a person has ceased to be an insurance agent of a licensed insurer and the insurer has taken all reasonable steps to inform or bring to the knowledge of policy owners of the fact of such cessation.

[39] The respondents took the "investment scheme" in 2009 and therefore the law governing the insurance matters in 2009 was the Insurance Act 1996. C Even then, the provisions of ss. 150 and 151 were unchanged but replicated in the Financial Services Act 2013.

[40] Sections 150 and 151 are all encompassing. Based on ss. 151 and 150(4) of the Insurance Act 1996, the learned SJ did not err in coming to the conclusion that statements made by the second and the third defendants D were deemed to have been made by the appellant and that upon the misrepresentation, the respondents are entitled to rescind the contract.

[41] Sections 150 and 151 of the Insurance Act 1996 stipulate as follows:

Section 150. Duty of disclosure.

E (1) Before a contract of insurance is entered into, a proposer shall disclose to the licensed insurer a matter that:

(a) he knows to be relevant to the decision of the licensed insurer on whether to accept the risk or not and the rates and terms to be applied; or

F (b) a reasonable person in the circumstances could be expected to know to be relevant.

(2) The duty of disclosure does not require the disclosure of a matter that:

G (a) diminishes the risk to the licensed insurer;

(b) is of common knowledge;

(c) the licensed insurer knows or in the ordinary course of his business ought to know; or

H (d) in respect of which the licensed insurer has waived any requirement for disclosure.

(3) Where a proposer fails to answer or gives an incomplete or irrelevant answer to a question contained in the proposal form or asked by the licensed insurer and the matter was not pursued further by the licensed insurer, compliance with the duty of I disclosure in respect of the matter shall be deemed to have been waived by the licensed insurer.

(4) No licensed insurer, insurance agent, licensed financial adviser or financial adviser's representative in order to induce a person to enter into or offer to enter into a contract of insurance with it or through him:

(a) shall make a statement which is misleading, false or deceptive, whether fraudulently or otherwise;

(b) shall fraudulently conceal a material fact; or

(c) in the case of an insurance agent, a licensed financial adviser or a financial adviser's representative, use sales brochure or sales illustration not authorised by the licensed insurer.

Penalty: One million ringgit.

(5) Where a person is induced to enter into a contract of insurance in a manner described in subsection (4), the contract of insurance shall be voidable and the person shall be entitled to rescind it.

Section 151 – Knowledge of, and statement by, insurance agent.

(1) A person who is authorised by a licensed insurer to be its insurance agent and who solicits or negotiates a contract of insurance in that capacity shall be deemed, for the purpose of the formation of the contract of insurance, to be the agent of the licensed insurer and the knowledge of that insurance agent shall be deemed to be the knowledge of the licensed insurer.

(2) A statement made, or an act done, by the insurance agent shall be deemed, for the purpose of the formation of the contract of insurance, to be a statement made, or act done, by the licensed insurer notwithstanding the insurance agent's contravention of subsection 150(4) or any other provision of this Act.

(3) Subsection (1) shall not apply:

(a) where there is collusion or connivance between the insurance agent and the proposer in the formation of the contract of insurance; or

(b) where a person has ceased to be an insurance agent of a licensed insurer and he has taken all reasonable steps to inform, or bring to the knowledge of, potential policy owners and the public in general of the fact of such cessation.

[42] The Insurance Act 1996 is a specific Act to deal with insurance matters and therefore, all insurance matter shall be dealt in accordance with the Act. Section 199 is a statutory requirement that other laws shall not be applicable if there are conflicts or inconsistencies with the Insurance Act 1996. Section 199 of the Insurance Act 1996 states:

199 – Application of other laws

Where there is a conflict or inconsistencies between a provision of this Act and that of the Companies Act 1965, the Contracts Act 1950 or the Cooperative Societies Act 1993 the provision of this Act shall prevail.

[43] From the above provision of s. 199, effect should be given to the provisions of the Insurance Act 1996.

[44] Section 151 of the Insurance Act 1996 specifically states that any knowledge or statement made by an agent or an act by an agent shall be deemed to be made by the insurer itself, notwithstanding the fact that the statement was misleading, false or deceptive. This section laid down the liability on the insurer though the statement or the act was made and done by the agent with the exceptions provided in sub-s. (3) ie,

(i) If there was collusion or connivance between the insurance agent and the insured; or

(ii) If the agent had been terminated and ceased to be an agent at the time of the contract of insurance.

[45] None of the above exceptions applied in this case. Section 151 does not seem to limit the authority of the agents. As long as the agent is authorised to solicits or negotiate a contract of insurance on behalf of the insurance company, it is sufficient to bind the insurance company. In this case, the second and the third defendants were authorised agents of the appellant at the time of the contract and that they were only terminated on 13 January 2012 *vide* letters in D17 and D18. From the evidence the second and third defendants misrepresented the policy as an investment scheme to the respondents in their course of business. In *Leong Kum Whay v. QBE Insurance (M) Sdn Bhd & Ors* [2006] 1 CLJ 1, the Court of Appeal in discussing s. 44A of the Insurance Act 1963 which is the present s. 151 of the Insurance Act 1996 stated:

> … Unfortunately, the learned arbitrator placed a very narrow and restrictive interpretation on s.44A. He construed the words "a person who has at any time been authorised as its agent by an insurer and who solicits or negotiates a contract of insurance in such capacity" as enabling an insurer to place limits on the agent's authority. But the section does not admit that. It speaks of the authority in general terms. It does not say that agent must be authorised to deal with a specific type of insurance. By reading it restrictively the learned arbitrator was introducing a further exception to those already provided by sub-s. (3). This, in my judgment, amounts to unauthorised legislation …

[46] In the case of *The "Melanie" United Oriental Assurance Sdn Bhd Kuantan v. WM Mazzarol* [1984] 1 LNS 41; [1984] 1 MLJ 260 the Federal Court held at p. 260:

> … [2] It is settled law that where an agent is authorised to negotiate and settle terms of proposal or delegated with a duty to investigate certain matters, the agent's knowledge is also the knowledge of the insurance company. In this case the learned judge was right in holding that the agent was acting as agent for the appellant company when he received the information about the earlier mishap from the respondent …

[47] In *Leong Kum Whay v. QBE Insurance (M) Sdn Bhd & Ors* (*supra*) the Court of Appeal held at p. 5: A

> … s. 44A of the Insurance Act 1963 requires, first, that there be an agent who is authorised by an insurer and second, that such an agent must solicit or negotiate a contract of insurance in his capacity as agent. Once these two conditions are satisfied certain consequences follow. First, the B agent is deemed to be the agent of the insurer for the purpose of the formation of the contract. Second, the knowledge of the agent about any fact that is relevant to the insurer accepting the risk is treated as the knowledge of the insurer. Where an insurer holds out that a person is its agent, then the knowledge of the agent is deemed to be the knowledge of the insurer. The only two circumstances in which sub-section (1) does C not bite are spelled out in subsection (3). These are collusion or connivance between the agent and the insured; and cessation of agency of which the insurer has taken reasonable steps to inform the public at large ...

[48] As stated earlier, s. 44A of the Insurance Act 1963 is the present D s. 151 of the Insurance Act 1996.

[49] In *Tan Jing Jeong v. Allianz Life Insurance Malaysia Bhd & Anor* [2011] 4 CLJ 710, an investment plan namely Investpro policy was sold by the insurance company by the misrepresentation of its agent. The High Court held that the agent did misrepresent that the premium of RM400,000 was a E one-time payment sufficient to cover the rest of the premiums throughout the subsequent years in relation to the Investpro policy. The High Court held that the feature of the policy was the most important factor that persuaded the plaintiff into agreeing to purchase the policy from both the defendants and that the plaintiff was convinced by the second defendant in that case who F advised him as such. The second defendant in that case was further held to have induced and misled the plaintiff into purchasing the Investpro policy.

[50] It cannot be denied that the second and the third defendants were acting as agents on behalf of the appellant. The fact that the appellant was not informed as to what the representation made to the respondent was an G internal matters of the appellant. The conduct of both the second and the third defendants was imputed on the appellant. The respondents were entitled to rely on the ostensible authority of the second and third defendants acting as agents of the appellant.

[51] The learned SJ in her judgment stated that she cannot accept the H appellant's argument that they cannot be liable for the misrepresentation made by the second and third defendants and this court agreed with her findings. The learned SJ stated:

> Mahkamah ini berpendapat dakwaan pihak D1 bahawa D1 tidak harus I bertanggungjawab atas salah nyataan agen adalah tidak boleh diterima. Apa-apa peruntukan di dalam perjanjian Agensi adalah antara agen dan principal dan sudah tentu tidak mengikat pemegang polisi. Dalam kes ini mahkamah berpendapat D1 tidak dapat melepaskan liability kerana plaintif

A pertama sebenarnya ada mengambil initiative untuk pergi ke pejabat D1 untuk mengesahkan representasi D2. D3 selaku pengurus yang duduk dalam pejabat D1 telah memberi keyakinan pada plaintif pertama tentang kebenaran kata-kata D2. Dalam keadaan demikian, mahkamah ini berpendapat adalah tidak munasabah untuk D1 melepaskan diri dari tanggungjawab terhadap plaintif-plaintif.

B

[52] The next issue raised by the appellant was the applicability of s. 148 of the Insurance Act 1996 which gives the policy holders a second chance looking at the policy to determine whether it meets their requirements (also known as the 'free look' period); a protection given to all policy holders. This, according to the policy, must be done within 15 days from the receipt C of the policy. The appellant contended that as this was not done, the respondents were precluded from challenging the policy or the pre-contractual representations made. It was submitted on behalf of the appellant that if the respondents did not accede to the protection accorded to them by s. 148 of the Insurance Act 1996, they have affirmed and thereby D lost their right to rescind the contract.

[53] Section 148 of the Insurance Act 1996 states:

Section 148 – Objection to life policy.

(1) A policy owner, within fifteen days after the delivery of a life policy E of any description to him or to a person who resides at his residence, may return the life policy to the licensed life insurer and it shall immediately refund any premium which has been paid in respect of the life policy and the life policy shall be cancelled subject only to the deduction of expenses incurred for the medical examination of the life insured.

F Penalty: Five hundred thousand ringgit.

(2) Subsection (1) shall not apply to a life policy insuring three or more persons.

(3) For the purpose of subsection (1), a life policy shall be deemed to be returned to a licensed life insurer on the date the life policy is received G by it or posted to it by registered post.

[54] The appellant further submitted that there was a lapse of time on the part of the respondents to take step to rescind the contract. Yearly statements were given to the respondents showing how much benefits they got under the policy and yet the respondents did not take any steps to complain or to H rescind the policy. The appellant argued that it took the respondents four years to file the suit and during the four years, the respondents had enjoyed the benefit of the insurance cover. According to the appellant, all the above factors were conclusive evidence to show lapse of time to rescind the policy and that the respondents have affirmed the policy and thereby losing the right I to rescind it.

[55] This court found that the contract of insurance between the respondents and appellant was not made "*uberrimae fides*" *ab initio* due to the misrepresentation made by the second and third defendants. There was a positive duty on the part of the appellant and the appellant cannot rely on estoppel to escape liability. There is a duty imposed by law to be truthful and the appellant could not discharged that duty simply on account of the fact that the respondents have failed to inquire about some material facts (*Tan Jing Jeong v. Allianz Life Insurance Malaysia Bhd & Anor*) (*supra*).

[56] In *Leong Kum Whay v. QBE Insurance (M) Sdn Bhd & Ors* (*supra*), Gopal Sri Ram JCA stated as follows:

> … So much for the insured's duty. For completeness I would add that there is a corresponding duty on the part of an insurer to act with utmost good faith towards its insured. In *Maschke Estate v. Gleeson* (1986) 54 OR (2d) 753, at 756, Montgomery J put the duty in this way;
>
> A contract of insurance is one of *uberrimae fides*, the utmost of good faith. This is not a situation where an insurer is indemnifying its assured and paying a third party. This is a case where the insurer is being asked to pay its own insured. The duty to act promptly and in good faith arises the day the insurer received the claim. To find otherwise is to fail to understand the realities of the market place.
>
> More recently, in *Katotikidis v. Mr Submarine Ltd* [2002] ACWSJ 10135, Taliano J referred to the judgement of the Supreme Court of Canada in *Whiten v. Pilot Insurance Company* [2002] 209 DLR (4th) 257 as follows:
>
> I note that in upholding the award of punitive damages in *Whiten*, the court observed that a contract between an insurer and its insured was one of utmost good faith because, although the insurer is not a fiduciary, it holds a position of power over an insured since the insured is in a vulnerable position and is entirely dependent on the insurer when a loss occurs. For that reason, in every contract of insurance, an insurer has an implied obligation to deal with the claims of its insured's in good faith. It was held that a breach of the implied duty of good faith meets the requirement of an independent actionable wrong …

[57] In *Tan Jing Jeong v. Allianz Life Insurance Malaysia Bhd & Anor* (*supra*), an agent made false representation that monies are paid for investment purposes as in this present case. The court found that a contract of insurance must necessarily have "duty of utmost good faith" between both parties. It was held that:

> (4) The fact that insurance contracts are in the nature of *uberrima fides* had placed the duty of utmost good faith on both parties, with equal force. All parties to an insurance contract must deal in good faith, making a full declaration of all material facts in the insurance proposal. Thus the insured must reveal the exact nature and potential of the risks that he transfers to the insurer, while at the same time the insurer must make sure that the potential contract fits the needs of, and benefits, the assured.

(5) Once a positive duty is imposed on a party by law to be truthful, including to disclose the material fact, that duty is not discharged simply on account of the fact that the other party failed to inquire about some material fact that has not been disclosed, but which fact was within the knowledge of the party having such knowledge.

(6) The effect of non-disclosure of a material fact in an insurance contract is exactly the same as that of a misrepresentation and it justifies the aggrieved party to avoid the contract; *Asia Insurance Co Ltd v. Tat Hong Plant Leasing Pte Ltd* (ref'd).

(7) The Plaintiff was not estopped from avoiding the said contract. Nothing could be adversely attributed to the plaintiff such that he ought to be estopped from avoiding the Investpro contract.

[58] It was obvious that the second and the third defendants did not abide by the duty of full disclosure and did not demonstrate utmost good faith in inducing the respondents to enter into the AMFlexi whole life policy.

[59] From the evidence, it was clear that the respondents had acted in accordance with their belief that the policy they bought was for an investment scheme. From the evidence and the findings made by the learned SJ, the first respondent gave sufficient explanation and took positive steps to clarify the said policy. The first respondent went to the office of the appellant and met the third defendant who at that point of time was the Unit Manager as well as the agent of the appellant. It was confirmed that it was an investment scheme and the third defendant confirmed that there will be 33% dividend and 6% yearly interest. From the evidence, the first respondent testified that the 33% dividend will be parked and only when he needed them he could take the money.

[60] This court was of the view and in line with the findings made by the learned SJ, the respondents had taken positive steps to get clarifications and only after the first respondent was told by a friend that it was not an investment scheme he instructed his solicitor to terminate the said contract. The respondents' solicitors sent two letters on 26 November 2013 (P15) and 23 December 2013 (P16). The latter specifically rescinded the contracts of insurance as below:

> We have been instructed by our client to give you NOTICE which we hereby do that since your agents induced our clients to accept life policy Insurance Nos: 000350155 & 000350156 by misrepresenting that it was an investment plan, the said policies shall be rescinded and your goodselves shall refund a sum of RM167,000 being the premiums paid in respect of their policies, interest and dividend promised.

[61] Learned counsel for the appellant argued that the first respondent ought to have read the whole policy since the policies were with him for four years. One could reasonably expect another person to do as such. But expectation is different from evidence. From the evidence of the first

respondent, it was clear and proven that he did not read the policy thoroughly and when he saw the word "whole life" he went to seek clarification but was told that it was still an investment scheme with a flexi plan covering a life policy upon death of the policy's holder. As stated by the High Court in *Tan Jing Jeong v. Allianz Life Insurance Malaysia Bhd & Anor* at p. 727 (*supra*):

> … From the evidence, nothing can be adversely attributed to the plaintiff such that he ought to be estopped from avoiding the Investpro contract. From the moment that he became aware of the true nature of the contract, he had taken positive steps to get clarifications on it and it was only after he failed to get a satisfactory explanation from the defendants that he had instructed his solicitors to write to the D1 to terminate the said contract. His legal rights under the circumstances, to avoid the Investpro policy had not been in any way compromised by his conduct upon him becoming aware of the true nature of the Investpro policy which he had purchased from the D1 through D2. There is nothing in the evidence led before this court that would have justified this court to rule otherwise. The plaintiff had done what he ought to do with respect to the policy. He had paid the premium in full. But as borne out by the evidence as led before this court, he was entitled to rescind it by reason of misrepresentation and material non-disclosure by the defendants. No estoppel ought to apply against the plaintiff.

[62] As to the lapse of time which can be taken to constitute affirmation or election to recognise a contract, this court was of the view that, everything would depend on the facts of the case and the nature of the contract. The four years lapse was not unreasonable as the first respondent took positive steps during those years to clarify the policy he took. Lapse of time can only be evidence of affirmation if it comes after the first respondent had discovered he was entitled to rescind. In this case, the respondents had taken all reasonable steps before and after discovering the truth of the matter.

[63] The appellant's contention that the respondents had enjoyed the benefit of the insurance policy was a far-fetched notion. The respondents paid a premium of RM100,000 as a one-time payment without knowing that it was a life insurance policy. Thereafter, in the second year, the respondents were asked to 'top-up' payment and it was instead reduced to RM2,500 after the first respondent said he could not afford to pay the additional RM5,000. The premium was in actual fact reduced to RM2,500 from RM5,000 and the coverage was reduced to RM25,000 from RM50,000. If at all any one of the respondents would have died the spouse would have obtained only RM25,000 for the supposedly 'one-time' payment for investment of RM50,000 due to the misrepresentation made by both the second and third defendants.

A **[64]** In the upshot, misrepresentation by the second and third defendants as agents of the appellant was undoubtedly proven and thus the appellant is liable for the acts of its agents pursuant to the Insurance Act 1996. Accordingly the appellant's appeal was dismissed with cost of RM10,000 to the respondents.

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